

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | | |
|------------------------|---|-----------------------------|
| ALVAH M. JONES, |) | |
| |) | No. CV-04-0413-CI |
| Plaintiff, |) | |
| |) | ORDER DENYING PLAINTIFF'S |
| v. |) | MOTION FOR SUMMARY JUDGMENT |
| |) | AND DIRECTING ENTRY OF |
| JO ANNE B. BARNHART, |) | JUDGMENT FOR DEFENDANT |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 15.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) Attorney Rebecca M. Coufal represents Plaintiff; Assistant United States Attorney Pamela Derusha and Special Assistant United States Attorney Stephanie R. Martz represent Defendant. Ms. Coufal, Ms. DeRusha and Todd Swensen, legal intern with the United States Attorney's Office, appeared at oral argument before the undersigned on July 12, 2005, at 2:30 p.m., in Spokane, Washington. After reviewing the administrative record and the briefs filed by the parties, and considering argument of counsel, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment in favor of Defendant.

1 Plaintiff, who was 44-years-old¹ at the time of the
2 administrative decision, filed applications for Social Security
3 disability insurance benefits (Title II) and Supplemental Security
4 Income (SSI)(Title XVI) benefits on February 28, 2001, alleging an
5 onset date February 25, 1998. He alleges a heart condition, back
6 surgery with leg, arm, rotator cuff and elbow numbness. (Tr. 90.)
7 Plaintiff also alleges he cannot read or write. (Id.) Plaintiff
8 had prior applications for SSI in 1995, 1996 and 1999. (Tr. 406,
9 409, 419.) Plaintiff had a limited formal education and is
10 functionally illiterate. (Tr. 207, 217.) He has past work
11 experience as a mechanic, automobile detailer, and aluminum grinder.
12 (Tr. 91.) Following a denial of benefits and reconsideration, a
13 hearing was held before Administrative Law Judge (ALJ) Richard
14 Hines. (Tr. 431-469.) The ALJ denied benefits; review was denied
15 by the Appeals Council. (Tr. 6-8.) This appeal followed.
16 Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

17 ADMINISTRATIVE DECISION

18 The ALJ concluded Plaintiff had not engaged in substantial
19 gainful activity and was insured for disability benefits through the
20 date of the decision. (Tr. at 22.) Plaintiff had severe
21

22 ¹Plaintiff represents he was born on January 11, 1959, on his
23 current applications for benefits. (Tr. 61, 423). Medical records
24 from Drs. Hall and Demakas reflect a date of birth of January 11,
25 1949. (Tr. 180, 322.) Other records indicate a date of birth of
26 January 11, 1949. (Tr. 285.) In his memorandum in support of his
27 Motion for Summary Judgment, Plaintiff clarified his actual date of
28 birth is January 11, 1959. (See Ct. Rec. 13, at 1, n.1.)

1 impairments, including mild degenerative disc disease of the
2 cervical and lumbar spine, as well as low average intellectual
3 functioning, but those impairments were found not to meet the
4 Listings. (Tr. 19.) The ALJ also found Plaintiff carries a
5 diagnosis of mild atherosclerotic heart disease with no evidence of
6 obstructive coronary artery disease, and some evidence of evolving
7 chronic obstructive pulmonary disease from smoking. (Tr. 19.)
8 However, the ALJ found these impairments did result in more than
9 minimal limitations in Plaintiff's ability to work and/or have not
10 lasted the requisite 12 month duration period. (Id.) Plaintiff's
11 subjective allegations were found not credible as to disability.
12 (Id.) The ALJ found Plaintiff had the residual functional capacity
13 to perform work in the light level of exertion subject to occasional
14 climbing (ramp/stairs), balancing, stooping, kneeling, crouching,
15 crawling; no climbing of ladder/rope/scaffolds; and work that is
16 simple or non-complex with oral instructions. (Tr. 19.)
17 Plaintiff's residual capacity precluded performance of his past
18 relevant work. Using the Grids as a framework at step five, the ALJ
19 found Plaintiff was "younger individual between the ages of 18 and
20 44," and had a "high school (or high school equivalent) education"²

21 _____
22 ²The record does not support the ALJ's finding of "high school
23 education or high school equivalent." In the hypothetical to the
24 vocational expert, Plaintiff was described as a "younger individual
25 . . . with a marginal education . . . 7th grade but special
26 education." (Tr. 466.) The vocational expert's testimony was based
27 on this level of education, and she concluded that Plaintiff could
28 perform work in the national economy. (Tr. 467.) The ALJ's

1 and no transferrable skills, but was able to perform a significant
2 number of light level jobs in the national economy. (Tr. 22-23.)
3 He found Plaintiff not under a "disability" as defined by the Social
4 Security Act. (Tr. 23.)

5 ISSUES

6 The question presented is whether there was substantial
7 evidence to support the ALJ's decision denying benefits and, if so,
8 whether that decision was based on proper legal standards.
9 Plaintiff asserts the ALJ erred when he (1) failed to fully develop
10 the record; (2) improperly found Plaintiff not credible; (3)
11 presented an incomplete hypothetical to the vocational expert and
12 (4) failed to call a medical expert to explain medical evidence.

13 STANDARD OF REVIEW

14 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
15 court set out the standard of review:

16 The decision of the Commissioner may be reversed only if
17 it is not supported by substantial evidence or if it is
18 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
1097 (9th Cir. 1999). Substantial evidence is defined as

19 erroneous finding is harmless error. *Curry v. Sullivan*, 925 F.2d
20 1127, 1131 (9th Cir. 1990) (applying the harmless error standard).
21 The erroneous finding regarding Plaintiff's level of education does
22 not affect the ALJ's ultimate finding, using the Medical- Vocational
23 Rule 202.21 as a framework, that Plaintiff is not disabled. *See cf.*
24 Medical-Vocational Rule 202.16 (younger individual, with residual
25 functional capacity limited to "light" work, illiterate or unable to
26 communicate in English, unskilled work experience is not disabled).
27 Further, the record supports the ALJ's finding that Plaintiff was
28 not as functionally limited as he alleged. (Tr. 20.)

1 being more than a mere scintilla, but less than a
 2 preponderance. *Id.* at 1098. Put another way, substantial
 3 evidence is such relevant evidence as a reasonable mind
 4 might accept as adequate to support a conclusion.
 5 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 6 evidence is susceptible to more than one rational
 7 interpretation, the court may not substitute its judgment
 8 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
 9 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
 10 (9th Cir. 1999).

11 The ALJ is responsible for determining credibility,
 12 resolving conflicts in medical testimony, and resolving
 13 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 14 Cir. 1995). The ALJ's determinations of law are reviewed
 15 *de novo*, although deference is owed to a reasonable
 16 construction of the applicable statutes. *McNatt v. Apfel*,
 17 201 F.3d 1084, 1087 (9th Cir. 2000).

18 SEQUENTIAL PROCESS

19 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 20 requirements necessary to establish disability:

21 Under the Social Security Act, individuals who are
 22 "under a disability" are eligible to receive benefits. 42
 23 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 24 medically determinable physical or mental impairment"
 25 which prevents one from engaging "in any substantial
 26 gainful activity" and is expected to result in death or
 27 last "for a continuous period of not less than 12 months."
 28 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 from "anatomical, physiological, or psychological
 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

29 In evaluating whether a claimant suffers from a
 30 disability, an ALJ must apply a five-step sequential
 31 inquiry addressing both components of the definition,
 32 until a question is answered affirmatively or negatively
 33 in such a way that an ultimate determination can be made.
 34 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 35 claimant bears the burden of proving that [s]he is
 36 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.

1 1999). This requires the presentation of "complete and
2 detailed objective medical reports of h[is] condition from
3 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

4 ANALYSIS

5 1. Credibility

6 Plaintiff contends the ALJ erred in finding him not credible
7 when he failed to reject his testimony with clear and convincing
8 reasons. He argues Dr. Bostwick's opinions that he exhibited
9 partial malingering should not have been given "great weight" by the
10 ALJ" because it is not supported by adequate objective testing.
11 (Ct. Rec. 13, at 6-8.) Defendant asserts that, despite competent
12 evidence of malingering (which precludes the requirement of clear
13 and convincing reasons), the ALJ provided appropriate reasons for
14 rejecting Plaintiff's testimony. (Ct. Rec. 16, at 7.)

15 The ALJ must engage in a two-step analysis in deciding whether
16 to admit a claimant's subjective symptom testimony. *Smolen v.*
17 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
18 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the
19 claimant must produce objective medical evidence of underlying
20 "impairment," and must show that the impairment, or a combination of
21 impairments, "could reasonably be expected to produce pain or other
22 symptoms." *Smolen*, 80 F.3d at 1281-82. Once the *Cotton* test is
23 met, the ALJ must evaluate the credibility of the claimant. *Id.* If
24 there is no affirmative evidence of malingering, the ALJ must
25 provide "clear and convincing" reasons for rejecting Plaintiff's
26 pain and/or symptom testimony. *Rollins v. Massanari*, 261 F.3d 853,
27 858 (9th Cir. 2001); *Smolen*, 80 F.3d at 1283-84. The ALJ may
28 consider the following factors when weighing the claimant's

1 credibility: "[claimant's] reputation for truthfulness,
2 inconsistencies either in [claimant's] testimony or between
3 [his/her] testimony and [his/her] conduct, [claimant's] daily
4 activities, [his/her] work record, and testimony from physicians and
5 third parties concerning the nature, severity, and effect of the
6 symptoms of which [claimant] complains." *Light v. Soc. Sec. Admin.*,
7 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's credibility finding
8 is supported by substantial evidence in the record, the court may
9 not engage in second-guessing. See *Morgan v. Comm'r of Soc. Sec.*
10 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If a reason given by the
11 ALJ is not supported by the evidence, the ALJ's decision may be
12 supported under a harmless error standard. *Curry v. Sullivan*, 925
13 F.2d 1127, 1131 (9th Cir. 1990) (applying the harmless error
14 standard); *Booz v. Sec'y of Health and Human Serv.*, 734 F.2d 1378,
15 1380 (9th Cir. 1984) (same).

16 Here, Plaintiff has presented evidence of a back condition that
17 reasonably could be expected to produce pain, thus satisfying the
18 *Cotton* test. Plaintiff testified he could not walk any distance,
19 could only lift one gallon of milk, and could not bend over due to
20 pain and numbness in his legs, arm and back. (Tr. 456-57.) He
21 stated he only sleeps two to three hours at a time, could only stand
22 in one spot for 30 minutes and sit for 15-20 minutes. (Tr. 460.)
23 He testified he lies down three to four times a day for 20 to 25
24 minutes due to cramping and pain. (Id.) He stated his heart "acts
25 up" when he exerts himself, about every two or three months, and he
26 takes nitroglycerin for his heart problems. (Tr. 461-62.)

27 The ALJ found Plaintiff not credible based on Dr. Bostwick's
28 diagnosis of partial malingering. (Tr. 20.) Plaintiff asserts that

1 Dr. Bostwick's findings are not supported by adequate objective
2 testing and are suspect due to varying reports by the medical
3 providers. (Ct. Rec. 13, at 7.) This argument is without merit.

4 Dr. Bostwick's opinions are based on a lengthy claimant
5 interview, review of extensive medical records and the following
6 objective psychological tests: Wechsler Adult Intelligence Scale-
7 Revised, Wide Range Achievement Test-3, Controlled Oral Word
8 Association Test, Mental Control Tasks, Rey Auditory Verbal Learning
9 Test, Rey Complex Figure Test, Portland and Babcock Story Recall
10 Tests, Draw-a-Clock test, Draw-a-Bicycle Test, Grip Strength Test,
11 Trails A, Seashore Rhythm Test, Finger oscillation Test, Lateral
12 Dominance Examination, Reitan-Klove Sensory -Perceptual Examination,
13 15 Item Memorization Test, Neuropsychological Symptom Checklist,
14 Benton Visual Retention Test-Revised, Wisconsin Card Sorting Test.
15 (Tr. 203.) A MMPI-2 personality assessment was not administered due
16 to Plaintiff's illiteracy and his limited intellectual ability.
17 (Tr. 218.) However, Dr. Bostwick noted that Plaintiff's test
18 battery was modified to accommodate his illiteracy. (Id.)

19 Dr. Bostwick concluded Plaintiff is functioning within the
20 borderline/low average range of general intellectual ability, with
21 severely impaired linguistic abilities, poor reading, spelling,
22 writing and arithmetic skills and clear evidence of dyseidetic and
23 dysphonetic dyslexia. However, based on test results and medical
24 history, Dr. Bostwick diagnosed partial malingering "manifested
25 primarily in exaggeration of symptoms, inconsistencies in
26 performance and self-report, objective evidence for feigning on some
27 neuropsychological procedures, and a history of diminished effort
28 both in physical therapy as well as on current examination." (Tr.

1 221.)

2 Dr. Bostwick's opinion and the ALJ's finding of partial
3 malingering are supported by substantial evidence. In addition to
4 the lack of effort observed by Dr. Bostwick (Tr. 220), the record
5 includes reports from Plaintiff's physical therapist that
6 corroborate Plaintiff's lack of effort in his physical capacities
7 evaluation. The record also includes reports from Dr. Langsberger
8 and Dr. Nall, treating physicians, expressing concerns about
9 Plaintiff's exaggeration of symptoms. (Tr. 151, 195, 200, 324.)
10 Both treating physicians opined Plaintiff was capable of sedentary
11 to light work. (Tr. 195, 329.) Dr. George Rodkey, agency physician
12 who reviewed and evaluated Plaintiff's medical records in the
13 physical residual functional capacities assessment concluded
14 "[s]ymptoms/report of almost total loss of function far exceed
15 objective findings. This statement is made by all health care
16 providers throughout evidence." (Tr. 354.)³

17
18 ³Plaintiff points out the discrepancies in his birth date on
19 medical records and argues this reflects the unreliability of
20 medical source reports and/or evidence of his neurological
21 impairments. (Ct. Rec. 13, at 6.) This argument fails, as the
22 record reflects it is the Plaintiff's lack of consistency in his
23 self-report and his observed lack of effort in objective testing
24 that serve as a basis for the ALJ's credibility findings, not
25 obvious clerical errors in medical records. Further, the current
26 neurological evaluation from Dr. Demakas indicates "no deficit of
27 memory or mentation, oriented to person, place and time. Attention
28 span and concentration are adequate." (Tr. 178.) Dr. Bostwick's

1 Although there was evidence of malingering in Dr. Bostwick's
2 report as well as notations from other providers, the ALJ gave other
3 clear and convincing reasons to discount Plaintiff's statements.
4 For example, the ALJ found Plaintiff made inconsistent statements to
5 medical providers, gave subjective inconsistent reports of heart
6 attacks and strokes without supporting medical documentation, and
7 gave exaggerated and inconsistent testimony. (Tr. 19.)
8 Specifically, Plaintiff reported different levels of education to
9 different providers, stating to the Medical Evaluation Panel that he
10 had reached 12th grade, but his education level was second grade.
11 (Tr. 227.) At the hearing, Plaintiff testified he had completed 7th
12 grade. (Tr. 436.) And on his disability report, he indicated he
13 finished 12th grade in special education. (Tr. 96.)

14 Plaintiff's treating physician, Dr. Nall, stated Plaintiff's
15 symptoms "exceed objective findings." (Tr. 18.) This is supported
16 by Dr. Nall's records, where he reports his observation that
17 Plaintiff exhibited a "normal gait and normal movement" while in the
18 reception area, but grimaced and groaned during the exam, even
19 though his "straight-leg raising with distraction while seated was
20 not painful." (Tr. 322-23.) Dr. Nall also observed that
21 Plaintiff's TENS unit was not turned on and appeared dusty, and
22 reported "his pain behaviors and fit appearance suggest that he may
23 exaggerate his symptoms which has been noted in the past." (Tr.
24 324.) These are appropriate reasons to discount Plaintiff's

25 _____
26 objective testing revealed "feigning on some neuropsychological
27 procedures, and a history of diminished effort both in physical
28 therapy as well as on current examination." (Tr. 221.)

1 testimony. *Batson v. Comm. of the Soc. Sec. Admin.*, 359 F.3d 1190,
2 1196 (9th Cir. 2004). The ALJ did not err in his credibility
3 finding.

4 2. ALJ's Duty to Develop the Record

5 Based on medical evidence, the ALJ found Plaintiff "carries a
6 diagnosis of mild atherosclerotic heart disease with no evidence of
7 obstructive coronary arterial disease and chest x-rays have revealed
8 some evidence of evolving chronic obstructive pulmonary disease in
9 a smoker." (Tr. 19.) Plaintiff contends the ALJ erred when he
10 failed to obtain Plaintiff's medical records from California to
11 evaluate the severity of his alleged heart condition. (Ct. Rec. 13,
12 at 5.) Defendant responds that the ALJ found Plaintiff's heart
13 condition caused him no more than minimal limitations in his ability
14 to work; therefore, there was no need to develop an earlier medical
15 history. (Ct. Rec. 16, at 12.)

16 In Social Security proceedings, the burden of proof is on the
17 claimant to prove the existence of a severe physical or mental
18 impairment by providing medical evidence consisting of signs,
19 symptoms, and laboratory findings; the claimant's own statement of
20 symptoms alone will not suffice. 20 C.F.R. § 416.908.

21 The Regulations further state "[w]e will develop your complete
22 medical history for at least the 12 months preceding the month in
23 which you file your application unless there is a reason to believe
24 that development of an earlier period is necessary." 20 C.F.R.
25 § 404.1512 (d), 416.912 (d). An ALJ's duty to develop the record
26 further is triggered "only when there is ambiguous evidence or when
27 the record is inadequate for proper evaluation of evidence." *Mayes*
28 *v. Massanari*, 276 F.3d 453, 4509-60 (9th Cir. 2001) (*citing*

1 *Tonapetyan v. Halter*), 242 F.3d 1144, 1150 (9th Cir. 2001)).

2 Although Plaintiff alleged a heart condition in his 2001
3 disability report, he did not submit medical evidence to support the
4 existence of this impairment. (Tr. 89.) Plaintiff self-reported to
5 various treatment providers that he had strokes and heart attacks in
6 the 1980's and 1990's. However, medical sources consistently
7 reported that prior records were unavailable. (Tr. 87, 193, 259,
8 381.) In September 1998, Dr. Edgar Figueroa referred Plaintiff to
9 John Demakas, M.D., for a neurological consultation. (Tr. 176.)
10 Dr. Demakas reported Plaintiff had a family history of cardiac
11 problems, had suffered a stroke in the 1990's from which he had
12 fully recovered, and also had a myocardial infarction. (Tr. 177.)
13 Upon examination, Dr. Demakas reported "[h]eart auscultation
14 demonstrates no abnormal sounds or murmurs. Peripheral vascular
15 system shows no edema by palpation and observation."
16 Neurologically, he found Plaintiff demonstrated "speech fluent. No
17 deficit of memory or mentation, oriented to person, place and time.
18 Attention span and concentration are adequate." (Tr. 178.) In
19 December 1998, Plaintiff went to Deer Park Hospital ER, complaining
20 of back pain and shortness of breath. (Tr. 381.) Chart notes
21 indicate "chest pain, nonspecific, atypical for cardiac." (Tr.
22 379.)

23 In January 2000, Plaintiff reported to examining psychologist
24 Allen Bostwick, Ph.D., that he had five strokes and three heart
25 attacks in the 1990's, the last being in 1996. (Tr. 206.) Medical
26 reports reviewed by Dr. Bostwick indicated Plaintiff reported five
27 heart attacks in the 1980's while living in Roosevelt, California.
28 (Tr. 212.) Treating physician E.A. Figueroa, M.D., saw Plaintiff in

1 January 2000. At that time, Plaintiff reported he was waiting for
2 the results of a cardiology examination, but no reports were
3 provided at that visit. Dr. Figueroa reported "on further review of
4 the charts, it does not show any evidence of any permanent heart
5 condition." (Tr. 260.) On February 22, 2001, Plaintiff saw Dr.
6 Figueroa for follow-up to an emergency room visit the day before at
7 Deaconess Hospital. According to plaintiff, medical providers told
8 him he had had a heart attack. Plaintiff reported he was sent home
9 and given a prescription, which he had not filled. Upon
10 examination, Dr. Figueroa found no evidence of heart condition.
11 (Tr. 277.) The February 21, 2001, x-ray report from Deaconess
12 Medical Center indicates "the heart size and pulmonary vascularity
13 appear normal." No abnormalities were noted. (Tr. 279.)

14 Neither of Plaintiff's treating physicians found medical
15 evidence of a serious heart condition. Plaintiff refers to no
16 medical evidence of heart problems to support his argument. The
17 only basis for this alleged impairment in the record is Plaintiff's
18 statements, which as discussed above, are inconsistent and were
19 properly found to be not credible. Plaintiff's statements, without
20 medical evidence, are not sufficient to trigger the ALJ's duty to
21 develop the record. Further, the alleged heart attacks occurred
22 approximately 10 years ago, and current medical records show no
23 serious heart problems of any duration. Plaintiff has not
24 identified specific medical records or stated with certainty that
25 such records exist. His speculation that there might be records to
26 confirm a heart condition before he stopped working does not merit
27 a remand for further development of the record.

1 3. Incomplete Hypothetical to Vocational Expert

2 Plaintiff contends the ALJ's hypothetical should have included
3 his illiteracy and moderate and marked restrictions cited in the DDD
4 Psychiatric Review Technique Form (PRTF) and Mental residual
5 Functional Capacity Assessment (RFC). (Ct. Rec. 13, at 10.) He
6 argues that without these restrictions, the vocational expert's
7 testimony cannot be considered substantial evidence. (Id. at 9.)

8 Dr. Bostwick opined Plaintiff was illiterate based on objective
9 testing results and Plaintiff's own statements. Plaintiff testified
10 he completed 7th grade but was evaluated at a second grade level.
11 (Tr. 436.) He stated he could not read or write more than his name
12 and could do little, if any, arithmetic. At the hearing, Plaintiff
13 was described as a younger individual with a marginal education, 7th
14 grade but special education, and work experience at skilled and
15 unskilled, medium strength work. (Tr. 466.) The ALJ's hypothetical
16 included the following: Plaintiff was able to perform the "full
17 range of light work, further modified by only occasional climbing of
18 ramps or stairs, no climbing of ladders, scaffolds, only occasional
19 balancing, stooping, kneeling, crouching, crawling . . . simple
20 repetitive work and requiring no written communication . . .
21 instructions, one to two steps." (Tr. 466.)

22 Vocational expert Deborah LaPoint found Plaintiff could perform
23 work as a cafeteria attendant, agricultural produce sorter, and
24 production assembler. (Tr. 467.) Adding the ALJ's additional
25 restriction of "no contact with the public," Ms. Lapoint stated that
26 would not significantly impact her opinion, as the jobs as produce
27 sorter and production assembler do not involve work with the public,
28 and the cafeteria attendant does not interact directly with the

1 public. (Tr. 468.) Plaintiff objects that this opinion does not
2 factor in the full impact of illiteracy, and thus the case must be
3 remanded for new vocational expert testimony. (Ct. Rec. 13, at 10.)

4 Illiteracy does not, per se, render a claimant disabled. *Pinto*
5 *v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001). The Medical-
6 Vocational Rules include categories for individuals who are
7 illiterate or unable to communicate in English. 20 C.F.R. Pt. 404,
8 Subpt. P, App. 2. Here, Ms. Lapoint specified in her testimony that
9 the hypothetical individual she was assessing had a marginal
10 education and could not process written instructions. (Tr. 466.)
11 Further, the ALJ specifically added non-exertional restrictions of
12 no written communication, only oral instructions and one to two
13 steps in simple repetitive work in his hypothetical. (Tr. 466.) It
14 is clear from the hearing transcript that the ALJ included
15 Plaintiff's limitations in reading and writing in his hypothetical.
16 The record supports the ALJ's assessment: Plaintiff testified he had
17 finished 7th grade and had the equivalent of a second grade
18 education. (Tr. 436.) He stated he helped his children with their
19 paperwork. He sustained employment as an auto mechanic for four
20 years and acknowledged he could perform tasks and follow directions
21 with oral instructions. (Tr. 91, 448, 442.) Plaintiff testified at
22 the hearing that he had taken the written driver's test three times
23 to get his drivers license. (Tr. 447.) When asked by the ALJ if he
24 had read the test, he stated "I filled it out to where I thought,
25 you know, was best of it and I got it by one." (Id.)

26 Objective intellectual testing indicates Plaintiff functions
27 within the upper borderline range of functioning. (Tr. 216.) The
28 ALJ properly considered Plaintiff's malingering and lack of

1 credibility in assessing the RFC and determined Plaintiff "is not as
2 functionally limited as he has alleged." (Tr. 19-20.) The ALJ's
3 RFC findings will not be disturbed if supported by substantial
4 evidence. See *Batson*, 359 F.3d at 1197. There was no error in the
5 ALJ's hypothetical or in his ultimate RFC finding.

6 Plaintiff also argues that the ALJ improperly excluded from his
7 hypothetical marked and moderate restrictions found in the State
8 agency mental residual functional capacity; therefore, the matter
9 must be remanded for new vocational expert testimony. (Ct. Rec. 17,
10 at 2-3.) In a June 23, 2001, RFC assessment, non-examining
11 psychiatrist John McRae, M.D., included in his summary conclusions
12 that Plaintiff was markedly limited in his abilities to understand
13 and remember detailed instructions, carry out detailed instructions,
14 and interact appropriately with the general public due to borderline
15 intellectual functioning, learning disorders and personality
16 disorders (passive aggressive). Other evaluated abilities were not
17 significantly limited. (Tr. 331, 338, 345.) His assessment was
18 based on a review of records, including Dr. Bostwick's examination.
19 (Tr. 343.) In his narrative, which is an explanation clarifying the
20 summary conclusions discussed above, Dr. McRae concluded Plaintiff
21 should not have a job that required talking to people. (Tr. 347.)
22 Dr. McRae also opined Plaintiff's supervisor should know his
23 limitations and give work that is neither too detailed nor complex.
24 (Id.)

25 Medical consultants in the State agencies such as Dr. McRae
26 make findings of fact at the initial stages of social security
27 proceedings. Once the proceedings reach the ALJ level, however,
28 those findings of fact become opinion evidence. 20 C.F.R. §

1 404.1527(f); see also SSR 96-5p. As such, they are subject to the
2 applicable rules in 20 C.F.R. §§ 404.1527, 416.927, in determining
3 the weight given those opinions.⁴ Here, the limitations in Dr.
4 McRae's narrative conclusion are consistent with the ALJ's
5 hypothetical (no contact with public; no written instructions,
6 simple, repetitive one to two step tasks). (Tr. 466.) Further, Dr.
7 McRae's opinions adopted by the ALJ also are supported by those of
8 examining psychologist, Dr. Bostwick.

9 Dr. Bostwick concluded Plaintiff was functionally limited due
10 to his borderline intelligence and learning disorders, but "there do
11 not appear to be any significant social and interpersonal barriers
12 that would compromise him in any work situation." (Tr. 221.) His
13 conclusions were based on a face-to-face client interview and
14 extensive objective testing. It is the ALJ's responsibility to
15 resolve conflicts or any ambiguity in the medical evidence in
16 formulating the hypothetical to a vocational expert. See *Andrews*,
17 53 F.3d at 1039. As an examining medical source who had the
18 opportunity to interact with, observe and test Plaintiff, Dr.
19 Bostwick's opinions are given more weight than those of a non-
20 examining medical source. *Benton v. Barnhart*, 331 F.3d 1030, 1038
21 (9th Cir. 2003). The ALJ properly included in his hypothetical Dr.
22 McRae's narrative conclusions that were consistent with Dr.
23 Bostwick's opinions, which were based on personal observation and
24

25 ⁴E.g.: "*Examining relationship*. Generally, we give more weight
26 to the opinion of a source who has examined you than to the opinion
27 of a source who has not examined you." 20 C.F.R. §§404.1527 (d)(1),
28 416.927 (d)(1).

1 objective evidence. In regards to Plaintiff's argument that
2 additional limitations should have been included, the ALJ is not
3 required to accept as true the limitations propounded by Plaintiff's
4 counsel. *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986).
5 Because the limitations included in the ALJ's hypothetical question
6 are supported by the record, there was no error.

7 4. Failure to Call Medical Expert

8 Plaintiff asserts the ALJ should have called a medical expert
9 to interpret the psychological evidence. Defendant, citing Social
10 Security Ruling 96-5, responds that a medical expert is only
11 required to resolve issues of equivalency.⁵

12 Here, at step two, the ALJ found Plaintiff's impairments did
13 not meet or medically equal the Listings. (Tr. 22.) This finding
14 has not been challenged, and a medical expert was not required to
15 clarify medical equivalency issues. During administrative hearings,
16 however, an ALJ may take testimony of an medical expert to assist in
17 the interpretation of medical evidence. 20 C.F.R. §§ 404.1527(f)

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19 ⁵An updated medical opinion from a medical expert is required
20 "[w]hen no additional medical evidence is received, but in the
21 opinion of the [ALJ] or the Appeals Council the symptoms, signs and
22 laboratory findings reported in the case record suggest that a
23 judgment of equivalence may be reasonable; or

24 When additional medical evidence is received that in the
25 opinion of the [ALJ] or the Appeals Council may change the State
26 agency medical or psychological consultant's finding that the
27 impairment(s) is not equivalent in severity to any impairment of the
28 List of Impairments." SSR 96-6p.

(2) (iii), 416.927 (f) (2) (iii). This is typically the case where there is conflicting or ambiguous evidence from treating and/or examining medical sources. See *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1996); *Andrews*, 53 F.3d at 1041; *Magallanes*, 881 F. 2d at 753. Here, Plaintiff does not assert conflicting medical opinions by his treating physicians. Rather, he contends the complexity of the psychological report required a medical expert to explain them. The decision to call a medical expert is within the discretion of the ALJ. As stated in *Magallanes*, the "analysis and opinion of an expert selected by the ALJ may be helpful to the ALJ's adjudication, and we should not impose burdensome procedural requirements that facilitate . . . second guessing the ALJ's resolution of conflicting medical testimony." *Magallanes*, 881 F.2d at 753. (Emphasis added.) It is well-settled law that it is the province of the ALJ to resolve ambiguities and/or conflicts in the medical evidence and the court may not second guess his determinations as long as they are supported by the record. *Andrews*, 53 F.3d at 1039. Here, the ALJ's findings regarding Plaintiff's psychological condition and mental functioning are supported by substantial evidence, including objective test results. Plaintiff's contention that the ALJ erred in not calling a medical expert is without merit.

CONCLUSION

The ALJ properly rejected Plaintiff's testimony based on the diagnosis of partial malingering. Credibility findings are further supported by reports of lack of effort, lack of credibility and exaggeration of symptoms by treating and examining medical sources. The ALJ did not have a duty to develop the record where allegations of a heart condition were based solely on Plaintiff's unreliable

1 self-reports and unsupported by any current medical records. The
2 ALJ's hypothetical adequately described Plaintiff's limitations as
3 supported by the record as a whole, and a medical expert was not
4 required to interpret the psychological evidence. Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
7 **DENIED.**

8 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
9 **Rec. 15**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED**
10 **WITH PREJUDICE.**

11 3. The District Court Executive is directed to file this
12 Order and provide a copy to counsel for Plaintiff and Defendant.
13 The file shall be **CLOSED** and judgment entered for Defendant.

14 DATED August 9, 2005.

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16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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